FOR ARGUMENT

No. 75-1153

IN THE

Supreme Court of the United States

October Term, 1976

D. LOUIS ABOOD, *et al.*,

Appellants,

v.

DETROIT BOARD OF EDUCATION, *et al.*,

Appellees.

CHRISTINE WARCZAK, *et al.*,

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ON APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND FOR THE INTERNATIONAL UNION, UAW AS AMICI CURIAE

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This brief *amici curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 109 national and international labor unions having a total membership of approximately

14,000,000 men and women, and by the International Union UAW, an independent industrial union of 1,400,000 members, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

SUMMARY OF ARGUMENT

1. Appellants maintain that "[t]his Court must * * * assume in passing upon the constitutionality of § 10 [of the Michigan Public Employees Relations Act ("PERA")] that it authorizes public employers and unions to compel unwilling public servants as a condition of their public employment to finance the partisan political and ideological activities of such unions, as well as their collective-bargaining activities." (Br. for Appellants, 19.) In Part I(A) of this brief, we demonstrate that this assumption is in error. The Michigan Court of Appeals declared that public employees who are covered by an agency fee provision may not be required to fund political activities of the union, and that any such employee who files a proper protest is therefore entitled to a rebate of the "portion of his money expended by the union * * * for causes and candidates to which he objects." (App. 104.) Thus, the agency shop clause in question and the statute authorizing it are valid in Michigan only on the condition that any properly objecting employees may obtain a reimbursement for political expenditures; that holding is of course binding here, since no cross-appeal has been taken. (See, *e.g., Law Students Research Council* v. *Wadmond,* 401 U.S. 154, 157-158, n. 8, 164, n. 18.)

Therefore, contrary to appellants, the only issue on the merits on this appeal is whether the government may require an employee, as a condition of his employment, to pay a fee to defray the non-political expenditures of the union

selected by the majority of his fellow employees in an appropriate unit as the exclusive bargaining representative of all employees in the unit.

Appellants also insist that on the view taken by the Michigan Court of Appeals of the political expenditures question, that court was obliged to enjoin in its entirety the application of the agency shop clause to them. But that injunctive remedy is the one that plaintiffs in *Machinists* v. *Street,* 367 U.S. 740, and *Railway Clerks* v. *Allen,* 373 U.S. 114, had sought and obtained in the state courts and which this Court, reversing those decisions, expressly held was "impermissible." These holdings were not, as appellants contend, merely statutory interpretations; *Street* and *Allen* held that an employee has no constitutional right to be relieved of the obligation of paying dues to a union merely because the union expends money for political purposes, rejecting the identical claim under the First and Fourteenth Amendments which appellants assert here.

2. It is our view that *Railway Employees Dept.* v. *Hanson,* 351 U.S. 225, is dispositive of the issues in this case. Appellants contend that *Hanson* is not determinative because it was a "preemption" case (Br. for Appellants, 194). In Part II, we first note the reasons that this contention is in error. We then turn to a discussion of *Lathrop* v. *Donohue,* 367 U.S. 820, which appellants do not dispute was a case which *did* involve a direct state rule requiring payment of fees to an organization—there, the state bar association.

In *Lathrop,* six members of the Court agreed that a state:

> "in order to further the State's legitimate interests in raising the quality of professional services, may consti-

tutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." (367 U.S., at 843. See also, accepting this aspect of the plurality opinion's analysis, *id.*, at 850 (Harlan and Frankfurter, JJ., concurring).

The agency shop clause at issue in this case is in all pertinent respects indistinguishable from the requirement approved in *Lathrop*. First, the requirement imposed here and in *Lathrop* is identical: to provide financial support, but not any other form of support, to an association of others similarly employed. Second, the consequences of non-compliance here and in *Lathrop* are identical: the individual may lose his present means of support. Third, the state interest served by the requirement here and in *Lathrop* is quite similar—to spread among all the members of a group engaged in certain employment the costs of programs relating to that employment and thought to benefit both the public generally and, in particular, the persons so employed. Indeed, as we demonstrate, the agency shop here is in several ways less restrictive than the integrated bar approved in *Lathrop*.

Finally, we show in Part II that appellants' attempts to distinguish *Lathrop* are unavailing, and that *Lathrop* also disposes of the contention that all the activities of the defendant union are "political."

3. In Part III, we proceed on the assumption that this case is *res nova* and explain the interests served by the Michigan statute authorizing agency shop clauses for public employees. From our analysis, it becomes clear that the

Michigan PERA, like the federal statutes upon which it is modeled—the RLA and the NLRA—encompasses a *set* of interrelated policy determinations with respect to labor relations. These include the fundamental decision that employee wages, hours and working conditions are to be determined by collective bargaining when a majority of the employees choose representation for that purpose; the assignment of certain functions and responsibilities to the chosen representative, including the exclusive representative's duty of fairness to all the represented employees; and the legislative decision that the costs of maintaining the activities of the representative which the employees have chosen may be spread among all the employees upon whose behalf the union does, and is required to, engage in collective bargaining and the pursuit of grievances.

We next show that the ruling of the court below is fully consonant with more general legal and economic principles governing the situations in which government may exact fees from a group of people for certain purposes without infringing upon constitutional rights. "It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality * * *." (*Usery* v. *Turner Elkhorn Mining Co.*, —— U.S. ——, 44 U.S.L.Wk. 5181, 5186.) The basic governing proposition in *Hanson* and this case is that the presumption of constitutionality as to legislation designed to adjust economic costs and benefits in an equitable manner is not lost merely because this is done by enforcing payments to an organization which has particular statutory responsibilities to a group broader than its own membership. This is so especially where those responsibilities involve activities in which individuals do not have any

constitutional right to engage on their own behalf—such as collective bargaining—and where the organization is democratically selected by a majority of those who will be affected by its activities.

4. Just as appellants' efforts to escape the authority of *Hanson* and its progeny and *Lathrop* is based on incorrect readings of those decisions, appellants likewise misunderstand the decisions of this Court which they cite in their favor. In Part IV, we address ourselves first to a facet of appellants' argumentative technique which is inimical to rational discourse: their willingness to assert, at different points of their brief, opposite sides of the same proposition. For example, appellants expound a theory of governmental absolutism which would, if accepted, require rejection of their own claim for relief against the defendant Board of Education.

We then discuss certain of the precedents appellants rely upon—in particular, *Speiser* v. *Randall*, 357 U.S. 513, *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, *Carter* v. *Carter Coal*, 298 U.S. 238, and *Coppage* v. *Kansas*, 236 U.S. 1—each of which but the last does not support appellants' position. And, while *Coppage* does express the same view of the public good, and particularly of the inutility of labor unions and the transcendent value of individual contract, which underlies appellants' policy arguments here, it represents a long-discredited approach to the Fourteenth Amendment and to the role of this Court in its enforcement. As the Court emphasized in *Lincoln Federated Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 537, the modern constitutional philosophy—that courts do not substitute their views upon public policy for

those of state legislatures—controls whether it is labor or its adversaries who invoke the discredited doctrine of *Coppage*.

ARGUMENT

I

Introduction—The Issue

The appellants maintain that "[t]his Court must * * * assume in passing upon the constitutionality of § 10 [of the Michigan Public Employees Relations Act ("PERA")] that it authorizes public employers and unions to compel unwilling public servants as a condition of their public employment to finance the partisan political and ideological activities of such unions, as well as their collective-bargaining activities" (Br. for Appellants, 19), and their argument proceeds on this premise. If this assumption was proper, the constitutional issue tendered but not decided in *Railway Employees Dept.* v. *Hanson*, 351 U.S. 225, *Machinists* v. *Street*, 367 U.S. 740, and *Lathrop* v. *Donohue*, 367 U.S. 820 (plurality opinion), would be before the Court. On this assumption, in other words, the Court would face a heretofore undecided question arising in an area of constitutional law in which the "self-imposed inhibition against passing on [a constitutional question] unless absolutely necessary to a decision of the case" (*United States* v. *U.A.W.*, 352 U.S. 567, 590), and the concomitant principle that such issues should be determined only when the record is "so shaped * * * as to bring [the constitutional question] before this Court as clearly and as sharply as judicial judgments upon an exercise of [governmental] power require" (*United States* v. *CIO*, 335 U.S. 106, 126 (concurring opin-

ion) have received particular emphasis.[1] But, as we show at the outset, the assumption from which appellants would have this Court proceed is refuted by the decision under review. Thus, the sole question which is before the Court is the constitutional issue which *was* decided in *Hanson, Street,* and *Lathrop,* squarely in favor of the present appellees' position.

A

Since this case was determined by the Michigan courts on the pleadings, the complaint defines its parameters. Plaintiffs in both cases now consolidated alleged that they are teachers in the Detroit public school system who "have refused to pay • • • regular monthly union membership dues or service fees • • •" (App. 11, 46) in the face of an "agency shop" clause in the agreement between the defendants—the Detroit School Board ("Board") and the Detroit Federation of Teachers ("DFT"), the exclusive bargaining representative of teachers employed by the Board —stating:

[1] See also *Hanson, supra; Street, supra; Lathrop, supra; Pipefitters* v. *United States,* 407 U.S. 385, 400. The constitutional questions not reached in *CIO, U.A.W.* and *Pipefitters* involved the constitutionality of statutory limitations under 18 U.S.C. § 610 upon the use of voluntarily paid union dues for certain political purposes and of voluntary contributions by union members to separate political funds maintained by unions. These issues are, however, interrelated with the issues in the *Hanson* line of cases, for as this Court recognized in the *Street* case:

> "Whatever may be the power of Congress to forbid unions altogether to make various types of political expenditures • • • an injunction [against all political expenditures by a union which receives some exacted dues] would work a restraint on the expression of political ideas which might be offensive to the First Amendment. For the majority also has an interest in stating its views without being silenced by the dissenters." (367 U.S., at 773.)

> "A. All employees, employed in the bargaining unit, or who become employees in the bargaining unit, who are not already members of the Union, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of the date of hire by the Board, whichever is later, become members, or in the alternative, shall, within sixty (60) days of the effective date of this provision or within sixty (60) days of their date of hire by the Board, whichever is later, as a condition of employment, pay to the Union each month a service fee in an amount equal to the regular monthly Union membership dues uniformly required of employees of the Board who are members." (App. 44.)

The complainants sought, as pertinent here: (1) a declaration that the agency shop clause is "void and of no effect," as "contrary to the provisions of the Constitution of the United States," because, *inter alia,*

> "[the] Defendant Federation [is] engaged in a number and variety of activities and programs which are economic, political, professional, scientific and religious in nature of which Plaintiffs do not approve, and in which they will have no voice, and which are not and will not be collective bargaining activities, i.e., the negotiation and administration of contracts with Defendant Board and • • • a substantial part of the sums required to be paid under said Agency Shop Clause are used and will continue to be used for the support of such activities and programs • • • and not solely for the purpose of defraying the cost of Defendant Federation of its activities as bargaining agent for teachers employed by Defendant Board" (App. 13–14);

(2) a declaration that "defendants may not as a condition to the tenure and continued employment of Defendant Board of Education [sic], require that Plaintiffs pay dues

or a service fee to Defendant Federation" (App. 52.);[2] and (3) an injunction prohibiting the Board from discharging them pursuant to the agency shop clause. (App. 52.)

The trial court denied all relief. (App. 35-37, 75-77.) On appeal, however, the Michigan Court of Appeals reversed and remanded the trial court judgment.[3] That court affirmed on the authority of *Hanson,* the "requirement for financial support of the collective bargaining agency by all who receive the benefits of its work." (App. 100, quoting *Hanson,* 351 U.S., at 238.) It also reached the issue not decided in *Hanson* but treated in *Street*—"whether or not funds collected pursuant to any agency shop clause could constitutionally be used for * * * activities that could be termed political" (App. 100-101) and held:

> "[E]mployees who are forced to contribute service fees to a collective bargaining representative may not be deprived of First Amendment freedom of expression. But, in order to preserve this right, the employee must make known to the union those causes and candidates to which he objects. The remedy then would be restitution to the employee of that portion of his money expended by the union over his objection." (App. 104.)

[2] The *Abood* plaintiffs also sought relief on the authority of the agency shop clause (App. 47, 50, 51), which provided that a teacher contesting the legality of the agency shop clause in court may not be discharged while such suit is pending final decision. (App. 45.) No teacher has been discharged because of non-compliance with the agency shop clause. (See Br. for Appellees, 6.)

[3] When the trial court first denied relief in *Warczak* it ruled, among other things, that no constitutional rights were abridged by the agency shop clause, and that the PERA permitted such a clause. (App. 29-37.) On appeal, the Michigan Supreme Court remanded on the statutory interpretation question in light of another case in which it held similar agency shop clauses not authorized by statute. (App. 59–60.) The trial court then reconsidered the statutory interpretation question under an intervening amendment to the PERA specifically authorizing an agency shop clause of the kind here in question, and held the amendment to be retroactive and to validate the clause in question. (App. 72–77.) The Court of Appeals reversed this retroactivity holding. (App. 100, 104, 106.)

Thus, the plaintiffs did receive part of the relief sought in their pleadings: The Michigan courts declared that public employees who are covered by an agency fee provision may not be required to fund political activities of the union, and that each such employee who files a proper protest is therefore entitled to a rebate of the "portion of his money expended by the union * * * for causes and candidates to which he objects." (App. 104.)

Obviously, appellants may not appeal from this portion of the judgment, since it was in their favor. And appellees have not cross-appealed, nor have they questioned the propriety of this declaration in their brief. Indeed, appellee DFT has amended its Constitution since the state appeals court decision to provide a rebate procedure for those agency fee-payers registering a protest to the expenditures of the DFT for "activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours and conditions of employment." (Br. for Appellees, Appendix B.)[4]

[4] The procedure thus enacted goes beyond that required by the appeals court, since it provides rebates for activities other than support of candidates and lobbying. Moreover, the amendment requires for a pro-rata rebate only a general protest to all such uses, while the appeals court opinion can be read to require a specification of "the political causes to which [a fee-payer] * * * was opposed." (App. 103–104.) Finally, the procedure now included in the DFT Constitution provides procedural protections, including review by a panel of non-members of the DFT, as part of the rebate procedure. (Br. for Appellees, Appendix B.)

In short, the state court has now held that the statute is constitutional only insofar as it requires financial support of the bargaining agents' non-political activities. That holding has been accepted and implemented by the defendants. This being so, the agency shop clause in question and the statute authorizing it are valid in Michigan only on the condition that any properly objecting employees may obtain a reimbursement for political expenditures, and they may be attacked in this Court only on the understanding that they will be so applied. (See, *e.g., Law Students Research Council* v. *Wadmond,* 401 U.S. 154, 157-158 n.8, 164 n.18.)

The question of the constitutionality of the use of exacted fees for political expenditures, a question this Court has thrice declined to reach in the exercise of judicial restraint (see *Hanson, Lathrop,* and *Street*), is consequently not presently here on this appeal.[5] And, in light of the action below

[5] Even if that question were here, there is another reason why this Court ought not to determine it in this case. While the Michigan Court of Appeals determined that this issue was squarely before it, in fact the issue came to that court in precisely the same posture as it was presented to this Court in *Hanson* and *Lathrop.* In both *Hanson* and *Lathrop,* as in this case, there were allegations that a portion of the compelled payments would be used for political purposes, and that plaintiffs objected to such expenditures. But such allegations were deemed insufficient by a unanimous court in *Hanson* and a plurality in *Lathrop.* For, as the *Lathrop* plurality noted:

> "Even if the demurrer is taken as admitting all the factual allegations of the complaint, even if these allegations are construed most expansively, and even if, like the Wisconsin Supreme Court, we take judicial notice of the political activities of the State Bar, still we think that the issue of impingement upon the rights of free speech through the use of exacted dues is [not] concretely presented for adjudication • • • Nowhere are we clearly apprised as to the views of the appellant on any particular legislative issue on which the State Bar has taken a position, or as to the way in which and the degree to which funds compulsorily exacted from its members are used to support the organization's political activities. • • • The [Wisconsin] Supreme Court assumed, as apparently the trial court did in passing on the demurrer, that the appellant was personally opposed to some of the legislation supported by the State Bar. But its opinion still gave no description of any specific measures he opposed, or the extent to which the State Bar actually utilized dues funds for specific purposes to which he had objected." (367 U.S., at 845-846.)

Thus, although the Wisconsin Court in *Lathrop* had reached the constitutional question regarding political expenditures, this Court was not constrained to do so where the specificity appropriate to constitutional adjudication was not present; relying on *Hanson,* the plurality determined not to do so. And, in *Railway Clerks* v. *Allen,* 373 U.S. 114, 118–119, n.5, a Court majority affirmed the propriety of the *Lathrop* plurality ripeness decision, distinguishing the holding in *Allen* that objection to specific expenditures was unnecessary to relief on the ground that *Allen* (and *Street*) did not involve, as *Lathrop* did and this case does, constitutional adjudication.

The record in this case suffers even more severely than did those in *Lathrop* and *Hanson* from a lack of specificity as regards the political expenditures issue. Consequently, and particularly in view of the fact that the Michigan courts recognized the existence of a constitutional right in regard to political expenditures and protected whatever such right there may later prove to be, the restraint exercised by this Court in *Hanson* and *Lathrop* ought also to obtain here.

and the appellees' response thereto, the question which is before the Court is somewhat narrower than that involved in *Hanson* and *Lathrop,* since in those cases it was not clear, as it is now here, that those protesting the compulsion to provide financial support to an organization had a right to refund of a pro-rata proportion of the monies paid to the extent of any political expenditures by the organization.

Therefore, the only issue on the merits in this case is whether a public employee may be required, as a condition of his employment, to pay a fee to defray the non-political expenditures of the union selected by the majority of his fellow employees in an appropriate unit as the exclusive bargaining representative of all employees in the unit. This issue is analogous, although more narrow, to the issue which *was* decided in *Hanson* and *Lathrop* and, as we show in Part II, *infra*, those precedents control the decision here.

B

Appellants in their second Question Presented (Br. for Appellants, 4) suggest that on the view taken by the Michigan Court of Appeals of the political expenditures question that court was obliged to enjoin in its entirety the application of the agency shop clause to them. The Court of Appeals held that the agency shop clause insofar as it permits the unions "over the employees' objection, to use his money to support political causes which he opposes" (App. 101) is invalid. It then stated that "whatever relief is fashioned can only be applied to those Detroit teachers who have specifically protested the use of their funds for political purposes to which they object," (App. 103), and went on to declare that a pro-rata restitutionary remedy would be appropriate, but:

> "In the case at bar the plaintiffs made no allegation that any of them specifically protested the expenditure of their funds for political purposes to which they object. Therefore, the plaintiffs are not entitled to relief on this basis." (App. 104.)

Point IV of appellants' brief, which is the argument addressed to the second Question Presented, is entitled "The

Teachers had standing to sue, and the injunctive relief they sought was in all respects appropriate." We note, first, that neither appellees nor the Michigan Court of Appeals ever suggested that appellants lack standing here. The court below did entertain appellants' claim on the merits and held, first, that the 1973 amendments to the PERA could not be applied retroactively, and second, that objectors' monies could not be used for political purposes. The statement that because the plaintiffs had made no specific objection "the plaintiffs are not entitled to relief on this basis" (A. 104) refers solely to the restitutionary remedy which that Court declared would be available to objectors in the future, and which appellants disclaim in their brief here. (See Br. for Appellants, 213-214.)

For this reason, the "overbreadth" doctrine appellants seek to invoke has no application whatever to this case. That doctrine permits

> "[l]itigants • • • to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected [activity] • • • The consequences of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to [First Amendment rights]." (*Broadrick* v. *Oklahoma*, 413 U.S. 601, 612, 613.)

Here, the Michigan Court of Appeals by "partial invalidation" removed the only "threat or deterrence" to free expression rights which it perceived in the statute. This

action was sufficient—if that Court's reliance on *Hanson* for the proposition that the collection of agency shop fees is not itself unconstitutional is, as we maintain, correct—to protect First Amendment rights of all those affected. For, after the decision below, any public employee covered by an agency shop clause has the right, upon proper protest to a union which makes political expenditures, to receive a proportional rebate. Thus, "others not before the Court" as well as the actual litigants will in the future be protected against the constitutional infirmity perceived, and there is no reason whatever to interdict the statute entirely.[6]

At the outset of the argument in support of the proposi-

[6] The contrast between this case and *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, the most recent of the overbreadth cases appellants cite, is illustrative. In *Doran*, if the Court had merely held that, because the litigants did serve liquor, the statute was constitutional as to them, the possibly unconstitutional aspects of the statute there in question would remain—specifically, its application to places where no liquor was served—and activities of "unquestionable artistic and socially redeeming significance" (*id.*, at 933) would undoubtedly be discouraged by the threat of prosecution. Even if this Court had in *Doran* unequivocally stated that the statute was constitutional as applied to the litigants but unconstitutional as applied to certain other situations, the declaration of unconstitutionality would have been dicta, since it would have no effect whatever on the actual litigants or on the judgment rendered as to them; and, since it would be impossible in the abstract to define precisely in which case the application of the statute would be unconstitutional, a deterrent effect on possibly protected activity would remain. Here, in contrast, the declaration protects entirely both these litigants and everyone else affected by the statute.

Appellants' reliance, in this connection on *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, also shows their inattention to the reasoning of this Court's decisions, as opposed to who won or lost the case. The reason that the conviction in *Shuttlesworth* was reversed

tion that "the injunctive relief [appellants] sought was in all respects appropriate," appellants state flatly: "There can be no doubt, after consulting the decisions of this Court in similar cases, * * * that the injunctive relief they prayed was not only *an* appropriate remedy but indeed the *only* remedy for the unconstitutional conduct here challenged." (Br. for Appellants, 199, emphasis in original.) And they conclude that portion of the argument by asserting: "For that reason, an injunction against enforcement of the agency-shop scheme is the *only* adequate remedy in this case." (Br. for Appellants, 214, emphasis in original.) [7]

Yet, that injunctive remedy is the one that the plaintiffs in the *Street* and *Allen* cases had sought and obtained in the

was that, at the time the defendant acted (*id.* at 156–157), the ordinance requiring a license to parade could fairly have been construed by him as leaving to the licensing authority absolute discretion as to whether the license should be granted.

> "This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." (*Id.*, at 150–151.)

That is not the situation here, because once objection is made known, the union has no discretion to deny the employee a refund of the amount due pursuant to the financial statement which, under the decision below, the union will be required to furnish. As so applied, the statute passes muster under the reasoning of *Shuttlesworth* itself, in that portion of its decision where it assumed the Birmingham ordinance to be constitutional for the future under the Alabama Supreme Court's limiting construction which withdrew the objectionable discretion from the Chief of Police. (See *id.* at 155–156, following *Cox* v. *New Hampshire*, 312 U.S. 568.)

[7] Thus, appellants do not contend in this Court that the courts below erred in denying them either of the remedies which *Street* and *Allen* did provide for the violation of the Railway Labor Act

state courts and which this Court, reversing those decisions expressly held was "impermissible." (See 367 U.S., at 771-772; 373 U.S., at 117-120.)

While they charge the court below with having misread those decisions, it is appellants who are in error. For, insofar as *Street* and *Allen denied* relief to the plaintiffs therein, those decisions were not merely "statutory interpretations" but also "constitutional adjudications", contrary to Br. for Appellants, 200-201. *Street* and *Allen* held that an employee has *no* constitutional right to be relieved of the obligation of paying dues to a union merely because the union expends money for political purposes, rejecting the identical claim under the First and Fourteenth Amendments which appellants assert here. (367 U.S., at 771; 373 U.S., at 119-120.) That being so, the Court disapproved the relief sought in those cases, since it "sweeps too broadly . . . [and] might well interfere with the . . . unions' performance of those functions and duties which the [statutory scheme] places upon them to attain its goal of stability in the industry." (373 U.S. at 120, *quoting* 367 U.S. at 771.)

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which was there found. (367 U.S. at 744–775; 373 U.S. at 122.) On the contrary, they expressly disclaim, and reject, the restitution of a share of the required fees, the second of the remedies this Court sanctioned in those cases. (Br. for Appellants, 213–214.) It is our understanding that this Court does not sit to decide questions not tendered by the appellants.

Further, the Court of Appeals, as noted, decided this case, in accord with state procedure, on the pleadings; and, on the pleadings, there was indeed no "allegation that any of [the teachers] specifically protested the expenditures of their funds for political purposes" (App. 104), for the simple reason that the complaint alleged that "[p]laintiffs . . . *have refused to pay* . . . service fees." (App. 11, 46, emphasis supplied). Having refused to pay *any* service fees, plaintiffs clearly could not, and did not, protest specifically expenditures from funds to which they did not contribute. This being so, they were "not entitled to any relief" of a restitutionary character.

II

This Court, in Railway Employees Dept. v. Hanson, 351 U.S. 225, and Lathrop v. Donohue, 367 U.S. 820, Has Already Determined the Only Issue in This Case

The question whether a state may constitutionally permit a public employer to enter into an agreement with a union (selected by the majority of the employees in an appropriate bargaining unit) setting, as a condition of employment, contribution toward the non-political expenditures of that union, has been definitively determined by this Court. *Hanson* decided this same issue with regard to railroad employees and did so explicitly on constitutional grounds. The Court's holding on this point in *Hanson* was accurately described in *Reid* v. *McDonnell Douglas Corp.*, 443 F. 2d 408, 410 (C.A. 10) (footnote omitted):

> "In *Hanson*, Justice Douglas reasoned that the Railway Labor Act expressly superseded state laws prohibiting the union shop. Accordingly, contracts negotiated with a union shop provision necessarily carry the imprimatur of the federal law, the element which provides the required governmental action. Indeed one may argue further that the union shop is a device which Congress had decided to encourage in the railway industry by nullifying any state laws to the contrary. Union activity pursuant to such encouragement is thus within the traditional ambit of state action analysis under the fourteenth amendment—a concept bearing close analogy to the federal governmental action required to invoke the first and fifth amendments."

In other words, contrary to appellants' argument here,

Hanson was not simply a "preemption" case;[8] rather, this Court determined that *because* the Railway Labor Act preempted state laws which forbade the union shop,[9] there was sufficient state action to bring the Constitution into play and to require a decision on the compatibility of the union shop and the First and Fifth Amendments.

We need not demonstrate at length the appellants' error in this regard. For there can be no dispute that *Lathrop* did involve a requirement directly imposed by the state

[8] Indeed, if, as appellants suggest, *Hanson* "is [solely] a preemption case" (Br. for Appellants, 194), it is difficult to perceive why this Court in *Street* construed the Railway Labor Act to preclude required financing of political expenditures, in order to avoid "constitutional questions . . . of the utmost gravity" concerning whether "Congress, in authorizing a union shop under § 2, Eleventh [may provide] that the labor organization receiving an employee's money should be free, despite that employee's objection, to spend his money for political causes which he opposes." (367 U.S., at 747.) For surely, private employers are free, absent governmental intervention, to condition employment on any requirement, including the requirement that the employee contribute, directly or indirectly to a particular political party, or to political causes, without infringing any constitutional rights. (*Cf. Hudgens* v. *NLRB*, 424 U.S. 507.) Thus, unless § 2, Eleventh involved significant governmental compulsion, there would have been no constitutional question to avoid in *Street*.

[9] As the *Reid* Court recognized, the reasoning by which the Constitution was brought into play in *Hanson* "has no applicability to the National Labor Relations Act" (443 F.2d, at 410). For, as the Court took pains to note in *Hanson*, 351 U.S., at 232, n.5, the NLRA, by virtue of § 14(b), "makes the union shop agreement give way before a state law prohibiting it." Thus, such an agreement does not have "the imprimatur of the federal law upon it." (*Id.* text. See *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96.) That the preemptive effect of § 2, Eleventh of the RLA was the sole and indispensable basis for subjecting union security agreements to

itself.[10] The issue posed there was whether a state may require all attorneys, as a condition of practicing their profession, to pay annual dues to a state bar association.

Appellants suggest that *Lathrop* did not decide *any* constitutional question. (See Br. for Appellants, 52-54.) This is a patent misreading of the opinions rendered in that case.

Two constitutional questions were raised in *Lathrop:* whether the state court could require "that appellant be an enrolled dues-paying member of the state bar [without abridging] his rights of freedom of association, and *also* [whether] his rights to free speech * * * were violated because the State Bar used his money to support legislation with which he disagreed." (367 U.S., at 823.) (Opinion of Brennan, J., emphasis supplied.) At least six members of the Court recognized that the state could not condition the practice of law on an abridgement of free associational

constitutional scrutiny is clear from the outset of the Court's discussion of this point in *Hanson*:

> "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements. The Supreme Court of Nebraska *nevertheless* took the view that justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor Act, sought to strike down inconsistent laws in 17 states." (351 U.S. at 231-232, emphasis supplied.)

This Court agreed with the Nebraska court's view on the state action issue. The decisions which find that the union shop agreements under the NLRA are the product of state action fail, we submit, to appreciate fully the narrow basis on which it was held to exist in *Hanson*.

[10] Nor did *Lathrop* involve a state enactment confirming a preexisting common-law right; attorneys have no right, absent legislation, to prohibit other persons from practicing law on any basis. (*Cf.* Br. for Appellants, 192.)

rights, but perceived no such abridgement in the required payment of dues alone.

Mr. Justice Brennan's opinion (for himself, Chief Justice Warren and Justices Stewart and Clark) concluded that a state:

> "in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even though the organization created to attain the objective also engages in some legislative activity." (*Id.*, at 843. See also, accepting this aspect of the plurality opinion's analysis, *id.*, at 850 (Harlan and Frankfurter, JJ., concurring). [11]

The issue upon which there was no majority in *Lathrop* was the *second* constitutional problem raised, as to the use of the exacted funds for political expression, an issue which is not presently before this Court. (See pp. 7-14, *supra*.)

A.

Lathrop's Rationale Governs This Case

Both the plurality opinion in *Lathrop* (*id.*, at 842-843) and the concurrence of Justices Harlan and Frankfurter (*id.*, at 849) regarded the question whether a state may condition the practice of law upon financial support of an association representing the interests of all lawyers as constitutionally identical to the question whether the government may condition, or permit others to condition, employment upon

[11] It appears that Justice Black also agreed with this holding, and dissented only on the second question. (See *id.* at 877, Black, J., dissenting.)

financial support of a union representing all employees in a bargaining unit. And the conclusion that the agency shop clause in this case must be constitutional if the integrated bar concept is valid does appear inescapable.

First, the requirement imposed here and in *Lathrop* is identical: to provide financial support, but not any other form of support, to an association of others similarly employed. Thus, in this case, as in *Lathrop,* the Court is "confronted * * * only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect." (*Id.*, at 828.)

Indeed, the degree to which the government here has compelled appellants to "associate" with an organization is considerably more attenuated than in *Lathrop.* In *Lathrop,* while the attorney was "free to attend or not attend the association's meetings or vote in its elections as he chooses" (*id.*, quoting 10 Wis. 2d 230, 237), and in that sense was not compelled "to associate with anyone" (*id.*), he *was* required to enroll as a member of the organization. Here, there is no such requirement.

Further, in *Lathrop* the state designated the organization in which membership was compelled, and the attorneys affected had no vote either upon whether there was to be an organization to perform certain functions, or upon which organization it was to be. In contrast, the teachers here had a direct voice in whether there was to be an association at all representing them and their fellow employees (PERA §§ 423.212, 423.214), and if so, which organization it was to be; and their right to seek to displace that association, together with a procedure for doing so, is protected by statute. Thus, not only is it merely financial support which is com-

pelled, but the right not to associate with the union in other ways, and to associate with those opposed to the union, is accorded recognition.

Second, the consequences of non-compliance here and in *Lathrop* are identical: the individual may lose his present means of support. For the consequence of non-compliance with the dues-paying requirement in *Lathrop* was exclusion from the practice of law in the state, while the consequence here is, similarly, exclusion from employment as a teacher in the Detroit Public Schools. Once again, in fact, the *Lathrop* sanction is if anything more onerous than in this case: the attorney in that case would be excluded for non-compliance from following his calling anywhere in the state and for any employer; teachers here would be excluded, even if they were unwilling to pay dues to *any* union, only from all teaching positions in Michigan in which there was an exclusive bargaining representative *and* that representative and the employer agreed to agency shop clause.[12]

Third, the state interest served by the requirement here and in *Lathrop* is quite similar—to spread among all the members of a group engaged in certain employment the costs of programs relating to that employment and thought to benefit both the public generally and, in particular, the persons so employed. In Part III (B), *infra,* we discuss the economic justification for the dues requirement in the collective bargaining situation. This discussion will demonstrate that the reasons underlying the agency shop requirement

[12] And, of course, if their objection is only to the DFT, they would be excluded only from the schools in which employees are represented by that union and there is an agency shop clause in effect.

are if anything more compelling than the reasons for an integrated bar. For many of the functions of the integrated bar outlined in *Lathrop* do not involve a benefit to the lawyers who choose not to participate directly in its programs, except in the remote sense that an individual attorney may benefit from being part of a profession well-regarded by the public. But the employees here receive, because of the exclusive representation concept and its corollary duty of fair representation, direct benefits from the activities of the union. Thus, the agency shop principle is based not solely on general public policy considerations but on fundamental notions of economic equity basic to much governmental action.(See Part III (B), *infra.*) This distinction seems to have been decisive for Mr. Justice Douglas, and explains why he dissented in *Lathrop* after authoring *Hanson* and concurring in *Street.* (See *Lathrop,* 367 U.S., at 879.)

The extent to which *Lathrop* must be controlling here may be seen more clearly if it is considered that the state undeniably could, after that decision, constitutionally impose with regard to teachers the same requirement imposed in *Lathrop*—that is, the state could require that *all* teachers, as a condition of practicing their profession, belong to a statewide organization of teachers engaged in activities similar to those performed by the state bar. Such an organization could perform many of the same functions performed by the DFT,[13] but it would have no power to compel employers to bargain with it, and thus to affect teachers' economic status and working conditions directly rather than

[13] For example, postgraduate education, publication of professional journals, professional meetings and seminars, publications for comment on new educational theories, group insurance, handling

indirectly. Since the government here has imposed a requirement *less* restrictive in several ways, as noted above, than that which would be constitutionally valid, while at the same time assuring a tangible and direct *quid pro quo* for the monies paid, the validity of the agency shop clause is evident.

B.

Appellants' Efforts to Distinguish Lathrop Are Unavailing

Appellants seek initially to separate *Lathrop* from this case on the basis of "the peculiar public character which lawyers acquire as court-officers." (Br. for Appellants, 55.) But the teachers here are different from the lawyers in *Lathrop* only in that their employment is not "quasi-governmental" (*id.*), it *is* governmental. Thus, while the pertinence of the distinction is far from obvious, it is clear that the "peculiar public character which lawyers acquire as court-officers" (*id.*) cannot render requirements valid as to them but not as to employees whose "public character" is in no way "peculiar." Surely, the government has as legitimate an interest in the effective running of schools as it does in the operation of the courts.

Appellants suggest also that in *Lathrop*, the organization whose support was required was a "public-serving agency," while the "activities of the Union * * * are self-serving, * * * antagonistic to the interests of taxpayers and of the public agencies which employ the Union's members,"

grievances, economic efforts to improve teachers' economic status, studies of teachers' salaries, and promotion of free toutorials would all be activities precisely parallel to those performed by the state bar in *Lathrop* (see 367 U.S., at 840–842) and are similar to functions now performed or which could be performed by the DFT.

and "in aid of the subversion of the legislative and administrative process for the private benefit of the Union's members [and pose] a substantial threat to representative government." (Br. for Appellants, 56, 176.) To state this "distinction" is to expose its irrelevance to constitutional adjudication. The legislature in authorizing public employee collective bargaining clearly made the judgment that the participation of public employee unions in setting the terms and conditions of employment does serve the public interest, and is neither "antagonistic" to the good of taxpayers and public agencies nor "subversive" in any sense. For, while the collective bargaining system does posit that unions will act in the interest of the employees they represent, it also posits that in doing so the unions will thereby be part of a process resulting in more stable and just labor relations and thereby a more efficient and productive work force. (*Cf.* PERA § 423.210(2).) That appellants and other citizens may disagree with the legislature's judgment in this complex area is, of course, entirely immaterial either to whether the government's interests are legitimate or to the weight to be accorded those interests.[14] In the *Lathrop* situation, for example, that fact that many citizens believe that lawyers do not in fact serve the public interest and that we would all be better off without them, a view stated most

[14] This same misconception of the courts' role in constitutional adjudication pervades much of Appellants' argument. Nearly one-third of Appellants' Brief (pp. 62-80, 103-105, 111-112, 120-128, 137-153, 161-164, 167-186) is devoted to various attempts to demonstate that public employee collective bargaining does not in fact advance the good of the public and, therefore, the state's determination to the contrary ought to be disregarded. But the premise that decisions as to where the public good lies is not the business of the courts but of democratically elected legislators underlies the

emphatically by Shakespeare, in King Henry VI, Part II, or that lawyers as a group have too much power already and promoting an organization of lawyers therefore is contrary to the common good, had no place, and ought to have no place, in assessing the constitutionality of the integrated bar scheme.

C.

Lathrop Disproves Appellants' Theory That All Activities of Public Employee Unions Are Political Activities

Lathrop is helpful in approaching this case for one additional reason: it makes clear that appellants' argument that public employee bargaining is inherently political and, therefore, that *all* expenditures by public employee unions from exacted funds are constitutionally suspect, cannot stand. The plurality opinion[15] in *Lathrop* reviewed the activities of the integrated bar association at length, and noted that "[t]he activities without apparent political coloration are many." (367 U.S., at 839.) Among those activities considered to be non-political, and as to which the exaction of fees were therefore considered not to constitute "*any* impingement upon protected rights of association," (*id.*, at 843) (emphasis supplied) were: postgraduate education of lawyers; publications for lawyers; handling of grievances; investigating and bringing legal actions upon unauthorized practice of law; giving opinions on legal ethics; setting up legal aid systems; preparing publications for the public on legal matters; and setting up programs "to further the economic well-being of the profession," including malpractice and other insurance. (*Id.*, at 839-842.) This list makes clear that the *Lathrop* plurality, in defining the line between activities raising *no* constitutional problem and those which *may*, used the "political" activity boundary in a narrow sense, to cover only activities involving

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federal Constitution; and this Court has often reiterated that it sits to determine whether governmental action is constitutional, not whether it is wise. As Mr. Justice Holmes noted in dissent in *Adair* v. *United States*, 208 U.S. 161, 192, in regard to the precise question whether the legislative decision to promote unionism is entitled to deference:

> "Where there is, or generally is believed to be, an important ground of public policy for restraint the Constitution does not forbid it, whether this Court agrees or disagrees with the policy pursued • • • . [Even if] the only effect [of a statute] were to tend to bring about the complete unionizing of laborers, I think that object alone would justify the act. I quite agree that the questions what and how much good labor unions do, is one on which intelligent people may differ,—I think that laboring men sometimes attribute to their advantages, as many attribute to combinations of capital disadvantages, that really are due to economic conditions of a far wider and deeper kind—but I could not pronounce it unwarranted if Congress should decide that to foster a strong union was for the best interests, not only of the [employees], but of . . . the country at large."

See also *Hanson*, 351 U.S., at 233-234:

> "The ingredients of industrial peace and stabilized labor-management relations are various and complex. They may well vary from age to age and from industry to industry. What would be needful one decade may be anathema the next. The decision rests with the policy makers, not the judiciary."

See *id.*, at 241-242 (Frankfurter, J., concurring).

[15] The concurring opinion (367 U.S., at 850) would have held the line between political and non-political expenditures of no constitutional significance at all, and would have held use of exacted fees for *all* the activities of the state bar, including promoting certain legislation, constitutional. Clearly, then, a majority of the Justices agreed at least that the activities considered "without . . . political coloration" by the plurality could be financed from exacted fees.

the promotion of specific legislation (see *id.*, at 835-839), and not activities which, while they might well (and were intended to) have an impact upon the functioning of the judicial system, did not involve intervention in the passing of statutes.[16] The court system is assuredly part of the government; and since appellants' argument that public sector collective bargaining is inherently political really involves nothing more than the obvious proposition that

[16] This discussion of the line drawn by the *Lathrop* plurality between "political" and other activities is not intended to indicate that we regard any, or all, expenditures from exacted fees for activities on the "political" side of the line as infringing upon the First Amendment rights of objecting fees-payers; nor did the *Lathrop* plurality so conclude. Indeed, the stress placed by the plurality upon the need for a well-developed record in this area suggests that it recognized that even if it were established that *some* expenditures for legislative activity constituted such an infringement, great care would be necessary in determining which.

In particular, we are troubled by the notion that expenditures to analyze and advise upon legislation which would have a direct and severe impact upon substantially all persons employed in a certain endeavor in regard to their employment may not be made from fees exacted from all such persons. For example, if the Wisconsin legislature were considering legislation to make legal malpractice insurance mandatory, or to set minimum or maximum legal fees, or to impose a special tax upon all lawyers, all attorneys would be affected financially if such legislation were passed. In that circumstance, we cannot see why the fact that a bar association chooses to participate in the legislative arena rather than elsewhere is necessarily relevant to the cost-sharing principles basic to the integrated bar (and to the agency shop), or why attorneys may not be required to support activities regarding such legislation when they *may* be required (as *Lathrop* holds) to support efforts of the bar association to deal with economic aspects of the profession when legislative intervention is not involved.

In contrast, the decision to support or not to support a particular candidate for public office will rarely represent this kind of

negotiated agreements will have an impact upon how the government is run, collective bargaining activities are not "political" in the sense of the *Lathrop* plurality.[17]

III

THE AGENCY SHOP CLAUSE SERVES THE FUNCTION OF SPREADING THE NON-POLITICAL COSTS OF THE EXCLUSIVE REPRESENTATIVE AMONG ALL EMPLOYEES BENEFITTED; THIS PURPOSE IS ONE PURSUED BY GOVERNMENT IN MANY AREAS AND INFRINGES NO FIRST AMENDMENT VALUES WHATEVER.

The foregoing demonstrates that this case is indistinguishable from *Hanson*, and from *Lathrop*, and consequently that the agency shop clause, insofar as it requires support for non-political activities of the union, does not constitute "any impingement upon protected rights of association." (*Lathrop*, 367 U.S., at 843.) In this section, we explain further the interests served by the Michigan

ascertainable congruence with the common interests of the group: A candidate supported is not bound to forward the interests of those who promote his candidacy; and the candidate will be called upon while in office to act upon matters having nothing to do with those common interests and as to which the views and interests of those from whom fees are exacted will be entirely divergent. For this reason, we would expect that any ultimate resolution of the issue left open in *Lathrop* will require careful line-drawing and, in all probability, distinctions between candidacy and issue support, and between issues supported.

[17] The court below recognized this distinction, and encompassed in its ruling that certain expenditures of the union would infringe the First Amendment rights of objecting fee-payers only expenditures for "support of candidates * * * and lobbying for the passage of bills in the legislature." (App. 101.) The propriety of this constitutional ruling, as noted, is not before this Court. (See pp. 7-14, *supra*.) The above analysis of *Lathrop* does make clear, however, that there is no First Amendment right here *more* expansive than that recognized by the Michigan Court of Appeals.

statute authorizing agency shop clauses for public employees, and then show that the ruling of the court below is fully consonant with more general principles governing the situations in which a government may exact fees from a group of people for certain purposes without infringing upon constitutional rights.

A.

The Theory of The Michigan PERA

The Michigan PERA was enacted in 1965 (1965 PA 379, MCLA 423.201 *et seq.*, MSA 17.455 (1) *et seq.*), and adopted for public employees in Michigan basically the same labor relations scheme as the National Labor Relations Act and the Railway Labor Act instituted decades earlier for most employees of private employers, with the single notable exception that the PERA does not protect but rather forbids strikes. Since the PERA was "modeled on the NLRA" (*Rockwell* v. *Crestwood School District Board of Education*, 393 Mich. 616, 635-636 (1975), appeal dismissed sub. nom. *Crestwood Education Association* v. *Board of Education of School District of Crestwood*, ... U.S. ....., 44 U.S. L.Wk. 3747 (1976)), and the Michigan courts look to NLRA precedents and policies in interpreting the PERA (*id.*), the interests served by the PERA are best understood by comparison with the federal statutes with which this Court is familiar, and by reference to the well-developed body of federal law.

First, the structure of § 423.210(1), the section authorizing agency shop clauses, follows the same general pattern as the NLRA and RLA. Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." This broad prohibition is subject to the proviso that an agreement may require the payment of dues to a labor organization as a condition of employment on or after the 30th day following the beginning of such employment, subject to limitations not presently pertinent. The broad language of § 2, Fourth of the RLA, likewise protects employees against discrimination in employment on the basis of union membership; but this is subject to the union shop proviso, § 2, Eleventh, which, of course, was the provision involved in *Hanson, Street* and *Allen*.[18]

Likewise, Section 423.210(1)(c) of the Michigan Compiled Laws (MCL) forbids public employers from discriminating "in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization". This prohibition, however, is subject to the proviso

> "[t]hat nothing in this act or in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative as defined in Sec. 11 [Sec. 423.211] to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative * * * ."

It is that proviso which appellants challenge in this action.

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[18] For present purposes the major differences between the treatment of this issue under the NLRA and the RLA is that the latter does not permit state laws which forbid the union shop to operate. (See the discussion of *Hanson* at pp. 19-20, *supra*.)

Its purpose has been declared by the Michigan legislature not merely in debate but in positive law. For § 423.210(2) of the Act declares:

> "It is the purpose of this amendatory act to reaffirm the continuing public policy of this state that the stability and effectiveness of labor relations in the public sector require, if such requirement is negotiated with the public employer that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative, by paying to the exclusive bargaining representative a service fee which may be equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative."

This is the same purpose which this Court in *Hanson* found underlies the union shop provision, § 2 Eleventh, of the RLA, and held to be constitutional:

> "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work.
>
> • • •
>
> To require, rather than to induce, the beneficiaries of trade unionism to contribute to its cost may not be the wisest course. But Congress might well believe that it would help insure the right to work in and along the arteries of interstate commerce. No more has been attempted here." (351 U.S., at 235.) [19]

[19] The same purpose is achieved by the union shop proviso to § 8(a)(3) of the NLRA, as amended in 1947. As this Court said last Term in *Oil, Chemical & Atomic Workers, etc.* v. *Mobil Oil,* ..... U.S. ....., 44 U.S. L.Wk. 4842, 4845:

> "Quite apart from the safeguards that it provided, Congress' decision to allow union security agreements at all reflects its concern that, at least as a matter of federal law, the parties to a collective-bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them. Again, the focus of this concern is *not* the hiring process, but rather the benefits to be derived from union representation during the period of employment—while the employee is on the job. Thus, the Senate Committee Report on what became the Taft-Hartley Act observed that § 8(a)(3) gives 'employers and unions who feel that [union security] agreements promoted stability by eliminating "free riders" the right to continue such arrangements.' S.Rep. No. 105, 80th Cong., 1st Sess., 7, 1 Leg. Hist. 413."

Second, the function of the bargaining representative under the PERA and the services that it performs on behalf of all the employees in the bargaining unit also parallel that of the representative under the RLA and the NLRA. Under each of these statutes the law-making authority has determined that employees shall have the right, if they choose to do so, to bargain collectively with their employer in determining the conditions under which they shall offer their labor. Thus, § 423.209, entitled "Right to Organize, Bargaining Collectively," of the PERA provides:

> "It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice."

This provision parallels the first sentence of § 2 Fourth of the RLA [20] and § 7 of the NLRA.[21] In aid of that right the

[20] "Employees shall have the right to organize and bargain collectively through representatives of their own choosing."

[21] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

legislature declared (in § 423.210(1)) certain conduct by public employers (or their officers or agents) to be unlawful. This list of illegal action is almost precisely parallel to § 8(a) of the NLRA which defines employer unfair labor practices.

Similarly, and of central importance to this case, PERA § 423.210(1)(e), which makes it unlawful "to refuse to bargain collectively with the representatives of its public employees, subject to the provisions of" § 423.211—the "exclusive representative" provision of the PERA—closely tracks § 8(a)(5) of the NLRA, which declares it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a)"—the exclusive representative provision of NLRA. In turn, § 423.211 provides as follows:

> "Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time may present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this Act."

> agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment."

This follows almost *in haec verba* § 9(a) of the NLRA, which we set forth in the margin.[22]

The drafters of the NLRA declared the purposes of exclusivity:

> "The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working conditions. Since it is wellnigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. • • • [And] majority rule carries the clear implication that employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf after representatives have been picked by the majority to represent all. • • • Employers, likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by

[22] Section 9(a) of the NLRA provides:

"Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive rep-

the majority than with numerous warring factions." (S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. (1935), at 13.)

Thus, "it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages, hours and working conditions * * *." (*Medo Photo Supply Corp.* v. *Labor Board*, 321 U.S. 678, 684, following *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, and (under the RLA) *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342.) In *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 62, this Court held:

"Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1947). If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority. 29 U.S.C. §§ 157, 158(a)(3). In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power,[13] in full awareness that the superior strength of some individuals or groups might be subordinated to the interest

resentatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-

of the majority. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338-339 (1944); H.R. Rep. No. 972, 74th Cong., 1st Sess., 18 (1935).

"[13] In introducing the bill that became the NLRA, Senator Wagner said of the provisions establishing majority rule: 'Without them the phrase 'collective bargaining' is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves.' 79 Cong. Rec. 2372 (1935)." [23]

Under federal law, this power of the exclusive bargaining representative "is not without limits." (*Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 564.) As this Court reiterated in *Hines* (*id.*):

"Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit,' *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility and duty of fair representation.' *Humphrey* v. *Moore*, [375 U.S. 335,] at 342."

See also *Emporium*, 420 U.S., at 64; *NLRB* v. *Allis-Chalmers*, 388 U.S. 175, 181.[24]

That doctrine has been unqualifiedly embraced by the

bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given the opportunity to be present at such adjustment."

[23] See also *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 563; *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180.

[24] Of course, under the RLA, too, the representative of a craft or class is, under § 2, Second, the *exclusive* representative (see *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, 197-201), and therefore owes the duty of fair representation to the entire craft or class, (*id.*, at 202, 203).

Michigan Supreme Court with respect to bargaining relationships governed by Michigan law,[25] and has been applied by the lower courts of that state in the case involving the same defendants as this case.[26] Nor do appellants contend that the union does not under state law owe them the duty of fair representation; instead, they assert that they would prefer to bargain with their employer individually.

B.

Requiring All Those Represented By A Bargaining Representative To Contribute To Defray The Agent's Non-Political Costs Is An Economic Regulation That Does Not Infringe Upon First Amendment Values

From this analysis, it becomes clear that the PERA, like the RLA and the NLRA, encompasses a *set* of interrelated policy determinations with respect to labor relations. These include the fundamental decision that employee wages, hours and working conditions are to be determined by collective bargaining when a majority of the employees choose representation for that purpose; the assignment of certain functions and responsibilities to the chosen representative, including the exclusive representative's duty of fairness to all the represented employees; and the legislative decision that the costs of maintaining the activities of the representative which the employees have chosen may be spread among all the employees upon whose behalf the union does, and is required to, engage in collective bargaining and the pursuit of grievances. The validity of the latter

[25] *Lowe* v. *Hotel and Restaurant Employees Union*, 289 Mich. 123, 205 N.W. 2d 167.

[26] *McGrail* v. *Detroit Federation of Teachers*, 82 LRRM 2623 (Wayne Circuit Court, 1973), *aff'd* Michigan Court of Appeals, No. 16493 (1974).

requirement must be assessed with reference to the purposes served by that requirement as part of a comprehensive system for setting employees' wages, hours, and working conditions.[27]

"It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the court with a presumption of constitutionality • • •." (*Usery* v. *Turner Elkhorn Mining Co.*, ... U.S. ....., 44 U.S.L. Wk. 5181, 5186.) We would state the basic governing proposition in *Hanson* and this case to be that the presumption of constitutionality as to legislation designed to adjust economic costs and benefits in an equitable manner is not lost merely because this is done by enforcing payments to an organization which has particular statutory responsibilities to a group broader than its own membership. This is so especially where those responsibilities involve activities in which individuals do not have any constitutional right to engage on their own behalf, and where the organization is

[27] Appellants suggest that this Court consider the validity of an agency shop clause in isolation, without regard to the exclusive bargaining principle. (Br. for Appellants, 101-102.) To do so, in light of the degree to which the exclusive bargaining role of the union is the primary justification for imposing cost-sharing, would be akin to determining whether to construct a roof without regard to whether or not there is a building.

As one reason for ignoring the context in which the agency shop clause has been authorized in assessing its validity, appellants suggest that exclusive bargaining for public employees may itself be unconstitutional. (Br. for Appellants, 102.) But as appellants concede, the constitutionality of exclusive bargaining for public employees is *not* at issue in this case.

Therefore, *Schlesinger* v. *Ballard*, 419 U.S. 498, demonstrates the fallacy of appellants' suggestion. There, this Court was faced with the question whether a man was denied equal protection because he was subject to being ousted from the Navy for non-pro-

democratically selected by a majority of those who will be affected by its activities.

1. In *Turner Elkhorn Mining Co., supra,* this Court upheld a provision requiring mine operators to compensate for certain disabilities those employees who terminated their work in the industry before the statute requiring such compensation was passed. The Court noted that "we would * * * hestitate to approve the imposition of liability on any theory of deterrence" (44 U.S. L. Wk., at 5186), but held that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor * * *. Whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." (44 U.S. L. Wk., at 5186-5187.)

The requirement imposed in *Turner Elkhorn* was not a tax but direct compensation to certain employees. Yet, it

motion after a shorter period of time than women navy officers. The Court held that the differential was justified by the fact that women are generally accorded less opportunity for sea advancement in the Navy as a consequence of limitations upon combat and sea duty, and that "Congress may thus quite rationally have believed that a longer period of tenure for women officers would * * * be consistent with the goal to provide women officers with "fair and equitable career advancement programs." (*Id.*, at 508.) While the dissent found "quite troublesome the notion that a gender-based difference in treatment can be justified by another, broader gender-based difference in treatment imposed directly and currently by the Navy itself * * * *" (*id.*, at 511, n. 1) (Brennan, J., dissenting), the majority, noting simply that "[a]ppellee has not challenged the current restrictions on women officers participation in combat and in most sea duty" (*id.*, at 508), declined to raise or decide constitutional questions as to aspects of the statutory scheme not at issue in the case.

would have been odd, indeed, had the employers in that case argued that requiring them to pay money to former employees infringed their rights of non-association, although of course First Amendment rights of association (or non-association) do not depend upon the existence of a formal organization or upon the number of people associating. And, it appears quite plain the result in *Turner Elkhorn* would have obtained if, instead of requiring direct payment to disabled employees, Congress had required the purchase of liability insurance from a private company or companies for that purpose. Many states, of course, have long imposed such a requirement upon users of automobiles (see *Ex Parte Poresky,* 290 U.S. 30, 32; *Continental Baking Co.* v. *Woodring,* 286 U.S. 352), and some persons are, because of their driving records, even assigned to a particular insurance company from whom they must purchase insurance. While an insurance company is assuredly an organization, and citizens may have reasons for not wishing to "associate" with it, requiring persons who engage in a certain activity to make payments to such organizations in exchange for a service, even if those persons would prefer to do without that service and bear the risks of doing so, has never been suggested to give rise to a legitimate First Amendment claim.

The reason why the First Amendment is not implicated where there is nothing more than a compulsion to purchase from an organization an economic service one would rather do without is not, of course, that the First Amendment does

Moreover, there is nothing to the proposition that statutorily authorized exclusive bargaining for public employees is unconstitutional. We have so demonstrated in the Brief *Amicus Curiae* for the AFL-CIO in *City of Madison* v. *WERC.* No. 75-946, at pp. 17-20 (see also pp. 8-16), and we refer to that discussion rather than repeating the argument.

not protect expression directed toward economic advancement, or the association of individuals for that purpose, for it does. (See *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, —— U.S. ——, 44 U.S. L. Wk. 4686, 4689-91.) Nor is it because the payment of money never constitutes a protected form of expression or association, for it can. (See *Buckley* v. *Valeo*, 424 U.S. 1, 21). Rather, the First Amendment at its broadest does not protect the pursuit of economic activities as such, or association for that purpose. (Cf. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 493-497; *Thomas* v. *Collins*, 323 U.S. 516, 543-544 (Douglas, J., concurring); see also *United States* v. *O'Brien*, 391 U.S. 367, 376-377.) [28]

To illustrate: There *is* a First Amendment right to advocate either collective or individual bargaining for employees, and to join together to do so.

> "[P]rotected 'union activities' include advocacy and persuasion in organizing the union and enlarging its membership, and also in the expression of its views to employees and to the public. For that reason, the State may not broadly condemn all union activities or discharge the employees simply because they join a union or participate in its activities. *It does not follow, however, that all activities of a union or its members are constitutionally protected.*
>
> "Thus, the *economic activities of a group of persons* (whether representing labor or management) *who associate together to achieve a common purpose are not protected by the First Amendment.* Such activities may be either prohibited or protected as a matter of legislative policy." (*Hanover Township Federation of Teachers* v. *Hanover Community School Corp.*, 457 F.2d 436, 460, 461 (C.A. 7) (Footnotes omitted; emphasis supplied).)

[28] Even organizations whose primary purpose is expression are not entitled to special treatment under the First Amendment of their economic behavior. (*Associated Press* v. *NLRB*, 301 U.S. 103, 132-133; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-193; *Associated Press* v. *United States*, 326 U.S. 1; *Grosjean* v. *American Press Co.*, 297 U.S. 233.)

Consequently, "there is no constitutional duty [of a public employer] to bargain collectively with an exclusive bargaining agent." (*Id.*, at 461, following *Indianapolis Education Assn.* v. *Lewallen* 72 LRRM 2071, 2072 (C.A. 7); *see* Brief for the AFL-CIO as *Amicus Curiae* in *City of Madison* v. *WERC*, No. 75-946, pp. 11-20.) For that reason, there is no First Amendment right to associate, or not to associate, by the payment of money or otherwise, in order to engage in the collective bargaining process. Similarly, there being no First Amendment right to compensate an individual for loss, or to contract for insurance, there is no concomitant right not to do so.[29]

2. Just as there are situations such as that involved in *Turner Elkhorn* in which certain individuals cannot engage in economic activity without imposing unintended harm upon others and it is just (and not unconstitutional) to require them to absorb the costs imposed on others insofar as can be done through financial transfers, there are also

[29] In *City of Charlotte* v. *Local 660, Firefighters*, — U.S. —, 44 U.S. L.Wk. 4801, a union "learned that it could obtain a private group life insurance policy for its members only if it had a dues checkoff agreement with the city," the employer of its members. (*Id.*, at 4801.) In determining whether the refusal to grant the checkoff was a denial of equal protection, this Court stated that it "would reject • • • if • • • made [the contention] that respondents' status as union members or their interest in obtaining a dues checkoff is such as to entitle them to special treatment under the Equal Protection Clause • • •" (*id.*, at 4802), thereby rejecting the notion that

situations throughout our society, and not merely in the exclusive representation context, in which a benefit cannot be provided for some individuals without providing benefits for others similarly situated, and in which equity therefore requires that, as long as there are democratic procedures for deciding whether or not the benefit should be provided, all share in the cost.

Economists denominate the benefit produced in such a situation as a "public good", a "collective consumption good", a "social want" or a "social good". One explains:

> "For a good, service, or factor to be 'exclusive,' everyone but the buyer of the good must be excluded from the satisfactions it provides * * *. Commodities which are not subject to the exclusion principle are said to possess *spillover* effects * * *. If a good is a public good, it will not be produced privately and sold in the free market, even though it would be in society's interest to have it provided * * *. Because one cannot economically be excluded from the benefits of a public good once it has been provided, private firms have no incentive to produce and market these commodities. Any potential buyer would refuse to pay anything like what the commodity is worth to him. Indeed, he would be likely to express an unwillingness to pay anything at all for it. He would reason: 'If I simply sit tight and refuse to pay, I may get the benefit of the good anyway, if someone down the line provides it for himself—after all, it is a public good.' However, if each buyer reasons this way (and presumably he will), the good will not be provided. Public goods will only be provided if collective action * * * is taken. Only through collective action can the availability of worthwhile

impeding an economic object of the organization involved any First Amendment considerations.

> public goods be assured." (R. Haveman, *The Economics of the Public Sector*, (1970) 25-26, 42-43.)

Another writes:

> "Let us now take a closer look at the nature of social want * * *. Exchange in the market depends on the existence of property titles to the things that are to be exchanged * * *. This mechanism breaks down with social wants, where the satisfaction derived by an individual consumer is but one among many, and any contribution he may render covers only a small part of the total cost. Consider, for instance, such items as a flood-control project, the more general benefits of which accrue to an entire region; a sanitary campaign that raises the general level of health throughout an area; expenditures for the judiciary system that secure internal safety and enforce contractual obligations; or protection against foreign aggression. All these contribute to the welfare of the whole community. The benefits resulting from such services will accrue to all who live in the particular place or society where the services are rendered. Some may benefit more than others, but everyone knows that his benefit will be independent of his particular contribution. Hence, as we have said, he cannot be relied upon to make a voluntary contribution * * *. [C]ompulsion is called for * * * to determine the extent to which resources should be released for the satisfaction of such wants; the extent to which particular social wants should be satisfied; and the way in which the cost should be spread among the group. In a democratic society, the decision to satisfy one or another social want cannot be imposed in dictatorial form. It must be derived, somehow, from the effective preferences of the individual member of the group, as determined by his tastes and his "proper" share in full-employment income. A political process must be substituted for the market mechanism,

and individuals must be made to adhere to the group decision." (R. Musgrave, *The Theory of Public Finance*, (1959) 9, 10, 11.)

Although the examples usually given are collective as to the polity generally, public or collective goods may be such only with regard to certain individuals:

> "One collective good goes to one group of people, another collective good to another group; one may benefit the whole world, another only two specific people • • •. It is of the essence of an organization that it provides an inseparable, generalized benefit. It follows that the provision of public or collective goods is the fundamental function of organizations generally. A state is first of all an organization that provides public goods for its members, the citizens; and other types of organizations similarly provided collective goods for their members • • •." (M. Olson, *The Logic of Collective Action*, (1965) 14 n.21, 15.)

The benefits provided by a labor organization empowered by statute to engage in collective bargaining are necessarily benefits of this kind:

> "A labor organization works primarily to get higher wages, better working conditions, legislation favorable to workers, and the like; these things by their very nature ordinarily cannot be withheld from any particular worker in the group represented by the union. Unions are for "collective bargaining" not individual bargaining. It follows that most of the achievements of a union, even if they were more impressive than the staunchest unionist claims, could offer the rational worker no incentive to join; his individual efforts would not have a noticeable effect on the outcome, and whether he supported the union or not he would still get the benefits of its achievements." (*Id.*, at 76.)[30]

[30] Olson goes on to point out that because of this situation—because "a rational worker will not voluntarily contribute to a (large) union providing a collective benefit since he alone would not perceptibly strengthen the union, and since he would get the benefits of any union achievements whether or not he supported the union" (*id.*, at 88)—

> "[a]rguments about [compulsion to pay fees to a union] in terms of 'rights' are • • • misleading and unhelpful • • • There is no less infringement of 'right' through taxation for the support of a police force or a judicial system • • •. Of course, law and order are requisites of all organized economic activity; the police force and the judicial system are therefore presumably more vital to a country than labor unions. But this only puts the argument on the proper grounds: do the results of the unions' activities justify the power that society has given them? The debate on the 'right-to-work' laws should center, not around the 'rights' involved, but on whether or not a country would be better off if its unions were stronger or weaker. • • • For if, under all circumstances, the individual has a 'right to work' (the right to work without paying union dues), surely he must have the 'right not to fight' (the

Thus, the "free rider" problem which underlies the need for compulsory payment of union dues (see pp. 34-35, *supra*) is not at all unique to exclusive collective bargaining, and the solution embodied in the PERA—conducting a vote of the relevant populace as to whether a given service is to be provided and then requiring all those in that populace to submit to the will of the majority and provide financial support, but not any other form of support, to the project—is not unique either. Rather, there is a set of economic circumstances which arise with some frequency in modern society, and which is traditionally provided for in a democracy by substituting the right to express one's preferences by a vote in an election for the "vote" by purchase which prevails where a free market approach suffices because a rational person wishing a service would pay for it.

Since the agency shop clause does nothing more than assess to the beneficiaries of an organization's activity the costs incurred by that organization on behalf of a group of people the majority of whom have selected the organization to perform certain functions for them, it is a classic instance of governmental intervention to readjust economic costs and benefits where the theory of the free market—that is, that individuals should make voluntary choices as to whether or not to purchase a good or a service—simply does not apply.[31]

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right to avoid military service), and the 'right to spend' (the right to avoid paying taxes for government services he does not want). Collective bargaining, war, and the basic governmental services are alike in that the 'benefits' of all three go to everyone in the relevant group, whether or not he has supported the union, served in the military, or paid the taxes. * * * It may seem strange to draw an analogy between the union and the state. Some have supposed, with Hegel, that the state must be different in all of the more important respects from every other type of organization. But normally both the union and the state provide mostly common or collective benefits to large groups. Accordingly, the individual union member, like the individual taxpayer, will not be able to see by himself that the collective good is provided, but will, whether he has tried to have this good provided or not, nonetheless get it if it is provided by others. The union member, like the individual taxpayer, has no incentive to sacrifice any more than he is forced to sacrifice." (*Id.*, at 88-91.)

[31] The costs legitimately spread in this way are not simply the direct cost of providing the service itself. For one thing, a union, like an insurance company or a government, has internal governance and communications costs which are a necessary incidence of providing the service. For another, a union, again like a corporation or a government, may perceive that it must expand its jurisdiction in order effectively to perform its functions. An insurance company, for example, may perceive that its ability to continue providing effective insurance to those compelled by government to purchase that insurance depends upon expanding its clientele, or upon acquiring other companies, and the costs of doing so are a legitimate incidence of the service provided.

Put another way, the teachers who are appellants here are necessarily, by force of their employment, in "association" with other teachers employed by the Detroit School Board. They work next to them in the same physical surroundings, apply the same educational policies, as determined by the Board, and are affected by the same working conditions—class sizes, hours, holidays, and so on. This would be the case whether or not there was a union representing the interests of employees. In all likelihood, given the size of the Detroit school district and the consequent need for bureaucratic organization, it would also be the case, whether or not there was a union, that one set of disciplinary rules and of wage and fringe benefit rates would govern all similarly situated teachers. Therefore, appellants and all other teachers employed by the school board are members of a group—that is, "a number of individuals with a common interest" (M. Olson, *supra*, p. 8)—even when there is no formal organization of those individuals. And the group is such that, at least in light of the exclusive bargaining principle and in all probability even without it,[32] some members of the group cannot act to change aspects of the employment relationship without thereby affecting other members of the group.

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[32] This is because one premise of the majority rule principle in collective bargaining is that, given the character of labor relations, a group's ability to bargain with their employer, and the terms of the agreement negotiated, will be affected by whether or not there are other employees or potential employees similarly situated but not bound by the bargain struck. (See pp. 37-39, *supra*.)

Thus, even though the Detroit school teachers undoubtedly, like any group of American citizens, have widely varying personal views upon a large variety of matters, including the desirability of unions generally and public employee unions in particular, the fact is that all such teachers' employment relationships are bound up together whether they desire that circumstance or not, as long as they remain, voluntarily, teachers in the school system.[33] Therefore, while it is true that these teachers are "associated" in one sense with all the other teachers in the Detroit school system, that "association" is not forced upon them; it is voluntary or, at least, it is a necessary consequence of voluntary action. The permission to this group of employees to form a formal organization and, through that organization, bargain over terms and conditions of employment does not create an interdependence, where none existed before; it merely permits some input into the terms of employment by the interdependent group, where none had existed before.

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[33] An analogy may be helpful. No one is compelled to drive an automobile, even though a governmental inhibition against a person doing so is such a disability in modern economic life as to give rise to a due process right. (*Bell* v. *Burson*, 402 U.S. 535.) But all individuals who do drive in a given area must usually drive over the same roads. Thus, it ordinarily is not possible to provide some people with good, safe roads and others with unsafe, bumpy roads. In this sense, although drivers have a range of views about questions of public policy undoubtedly as broad as the views current in the American populace generally, and probably also as broad a range of views upon whether it is wise to spend a great deal of money improving the highway system, all drivers constitute a group with a common interest in the quality of the roads. Therefore, once it is determined by a democratically elected body to build better roads, it is equitable to require all those who use the roads,

Since the only requirement imposed by the agency shop clause is financial, and since the duty with which the union thus supported is entrusted by statute is directly related to common aspects of the larger unorganized group which it represents, there is no meaningful sense, symbolic or otherwise (see *Buckley* v. *Valeo*, 424 U.S., at 21), in which exaction of fees itself is a requirement to associate. If there is a relationship among all the teachers, it exists aside from the existence of the union; and the union, as to non-members, is simply purveying a service, although, for the reasons indicated, and similarly to many other situations, the purchase of the service is obligatory.[34]

Thus, this case really involves nothing more than a governmental decision that the costs of providing a col-

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whether they initially favored the improvement or not, to pay for them (see *Continental Baking Co.* v. *Woodring*, 286 U.S. 352, 365-366; *Hendrick* v. *Maryland*, 235 U.S. 610, 623-624); this is done by the federal government through a gasoline tax which finances in part the Federal Highway Trust Fund (see Section 209 of Act of June 29, 1956, c. 462, Title II, 70 Stat. 397, as amended; see also 23 U.S.C. §§ 120, 126). Those who do not wish to pay such fees then have two options: first, not to drive; second, to seek to reverse the policy decision to build more and better highways, by voting against legislators supporting highway building and organizing others to do so.

[34] To illustrate once again with an analogy: Insurance companies usually provide health insurance more cheaply to a group of commonly-employed individuals than to single employees; and they may require all such employees to participate in order to get group rates, to prevent employees who are better risks from refusing to participate and thereby disturbing the insurance principle. All commonly employed persons may therefore have interpendent interests in this regard, whether they wish such "association" or not. And, we would expect, it would not be an unconstitutional condition of public employment to require all employees to enroll in a

lective economic benefit should be spread across all the members of the group benefitted; and the members of the group are, as they are in our society generally, given democratic rather than economic control over whether the benefit should be provided. Governmental action of this kind does not implicate First Amendment values at all and, consequently, the decision below, and the principles underlying *Hanson,* should be upheld.

3. It should be noted that the two conditions satisfied in this case—that the activities of the organization financed through exacted fees are primarily economic activities, and that there is a direct, collective benefit provided by the organization's activities—do not appear to be *necessary* to the conclusion that the exaction of fees does not infringe upon freedom of association. In *Lathrop,* for example, some of the main activities in which the state bar engaged *do* appear to be ones as to which there is First Amendment

designated health plan provided by an association or corporation, whether they wished the insurance or not, and whether the association or corporation also engaged in political activity or not.

This illustration, and the discussion in the text, show why appellants' heavy reliance on *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, is entirely misplaced. In his concurring opinion in *Lathrop,* 367 U.S., at 857-860, Mr. Justice Harlan demonstrated that the subsequent decision by a multipurpose organization to use exacted fees for political purposes is entirely different from, and of far less constitutional significance than, the compulsory affirmation of belief at issue in *Barnette.* Whether or not Justice Harlan's analysis is sufficient to dispose of the political expenditure question to which it was addressed, it certainly demonstrates that compulsion to pay for an economic service amounts neither to a required affirmation of belief in the necessity or wisdom of that service, nor forced adoption of political views expressed by that organization with funds otherwise derived.

protection—for example, publications on legal matters, and seminars for lawyers.[35] And, the benefit to lawyers generally from the state bar's program were not necessarily either economic or collective. That is, legal publications or continuing education class can be provided through a market system, for they do not have the characteristic that providing them for one person in a group will necessarily provide them for others; there is a collective benefit only

[35] This suggests that appellants' simplistic notion that every constitutional right necessarily entails "freedom either to act or to decline to act in respect of the subject in question" (Br. for Appellants, 40-41) is in error. For example, while the Seventh Amendment guarantees to a defendant in a criminal trial the right to a trial by jury, this Court has squarely held that a defendant in a criminal case is not constitutionally entitled to be tried before a judge alone. That was the precise holding of a unanimous court in *Singer* v. *United States,* 380 U.S. 24. (See the Court's discussion therein (*id.* at 33-34) of *Patton* v. *United States,* 281 U.S. 276 and *Adams* v. *United States ex rel. McCann,* 317 U.S. 269, both cited at Br. for Appellants, 41.) So too, for example, a defendant's right to a public trial does not carry with it the right to be tried in secret, and his right to be free from cruel and unusual punishment does not carry with it the right to have such punishment inflicted upon him, even though the defendant so desires on the basis of a deliberate judgment that he can thereby more completely cleanse his guilt. And, while the Establishment Clause of the First Amendment gives every citizen the right not to have a portion of his tax monies used to advance religion, a citizen who wishes some portion of his taxes to be used for religious purposes has no such countervailing right. Thus, whether and to what extent the Constitution creates a "freedom of self-determination" (Br. for Appellants, 98) cannot be derived solely by logic, implying the negative of a protected right; the answer requires in each instance that the precise freedom claimed be examined in light of the history and purpose of the constitutional provision which is invoked. This was the method of analysis in *Singer, supra,* and in *Faretta* v. *California,* 442 U.S. 806.

in the sense that there may be some intangible spillover advantage to all lawyers if some lawyers are better informed and better trained.[36]

Similarly, in two recent federal cases, the question was whether it was constitutional to require all students at state universities to support, through special student activity fees, student government, student organizations, cultural activities, lectures on subjects of student interest and a student newspaper which expressed political views of the editors. (*Arrington* v. *Taylor,* 380 F.Supp. 1348 (M.D.N.C.), *aff'd per curiam* 526 F.2d 587 (C.A. 4), *cert. denied* 424 U.S. 913; *Veed* v. *Schwartzkopf,* 353 F.Supp. 149 (D. Neb.), *aff'd* 478 F.2d 1407 (C.A. 8), *cert. denied* 414 U.S. 1135.) These organizations and activities clearly were such that students denied the opportunity to engage in them could claim First Amendment infringement. (*Healy* v. *James,* 408 U.S. 169.) Nonetheless, since the students had voluntarily become part of an educational institution, and since "the activities complained of were meaningful part of the educational process and complemented formal classroom instruction * * * to subsdize these activities from student fees violated no constitutional rights of the students." (*Arrington, supra,* 380 F.Supp. at 1363.)[37]

There is no reason, however, to pursue this error further. For, it is at least the case that as to matters concerning which there is no right to associate, there is no right of non-association. That is the principle necessary to our present argument.

[36] This is the kind of collective benefit which justifies, for example, providing public schools at the expense of all living in a certain community, whether or not they use those schools for their children or have any children at all.

[37] The *Arrington* district court also confronted directly the question left open in *Lathrop,* and concluded that the fact that the newspaper in question also expressed the political views of its staff

Thus, it seems that governments have fairly wide latitude to exact fees from a group of people for the support of organizations serving all of those people in ways related to a common, special interest they share. That is, the activities of the state bar in *Lathrop* generally involved matters relating to legal practice; the activities supported by student fees in *Arrington* and *Veed* generally related to educational matters and university affairs; and the activities of the union in this case generally relate to the terms and conditions of employment of teachers. This case, however, because the two conditions noted above *are* satisfied, is a classic instance of government regulation of economic activities, and the further development of principles stating the limits of government imposed cost sharing where the benefit produced is non-economic, collective only in a more remote sense, and does involve protected activity should properly await cases involving those situations.

IV

Appellants Misuse the Decisions of This Court

As we have shown in Part II, appellants' effort to escape the authority of *Hanson,* and its progeny under the RLA, and *Lathrop,* is based on incorrect readings of these decisions and is therefore futile. Appellants likewise misunder-

did not infringe the freedom of expression of those who disagreed with the views expressed but were required to contribute to the newspaper. In particular, the court stated that even if the student newspaper *were* considered a state agency, which it thought it was not for all purposes even though it was supported by exacted fees, "[T]he notion that it is unconstitutional and somehow violative of the rights of individual members of society for a government to advocate a particular position is erroneous." (*Id.,* at 1364.)

stand the decisions of this Court which they cite in their favor. Given the admittedly unusual length of appellants' argument (see Br. for Appellants, 9), it would only compound the burden on this Court were we to respond thereto in detail. We shall instead confine ourselves to appellants' major arguments which have not already been dealt with.

First, however, we shall address ourselves to another facet of their argumentative technique which is inimical to rational discourse: their willingness to assert, at different points of their brief, opposite sides of the same proposition. Appellants even expound a theory of governmental absolutism which would deny public employees any rights vis-a-vis their employer—a theory which, if accepted, would, of course, require rejection of their own claim for relief against the defendant Board of Education.

A

Whereas at the outset they state that "public employment may not be conditioned on non-membership in a labor organization" (Br. for Appellants, 34, and see the subsequent discussion *id.* 34-40, and the cases cited *id.* 35-36, n. 14)—a proposition with which we fully agree—appellants later assert: "We cannot imagine that a court true to its duty to protect our constitutional system could construe the First Amendment so as 'absolutely' to protect public employees in forming and joining unions *even when their actions were incompatible with the continued good order and proper functioning of government*" (*id.* 113-114, emphasis in original).[38] But this assertion, if accepted, would

[38] As appellants' subsequent argument shows, in their view the actions of all public employee unions are "*incompatible with the*

undermine appellants' entire case; if there is a freedom of non-association, it at least cannot have a broader scope than the freedom of association from which it is implied and which alone has thus far been recognized by this Court. (See n. 35, *supra.*) Thus, if there is no constitutional right to associate with unions, there surely is no right not to do so.[39]

continued good order and proper functioning of government (*id.* 114, emphasis in original). Thus, according to them, membership in any public employee union is not constitutionally protected.

[39] For reasons we have explained, n.35, *supra,* the present case presents no occasion for determining whether the Constitution protects some forms of non-association; we may assume that it does. In particular, the case does not require the Court to decide whether, and in what circumstances, the Constitution protects the right not to be a formal member of an organization, or to participate in its affairs. The Michigan PERA does not require this. The very NLRA cases which appellants cite for the proposition "that the union-membership relationship is contractual—hence voluntary—in character" (Br. for Appellants, 44) draw this distinction between the obligation to pay dues to the union as a condition of employment, and the obligation to conform to the union's internal rules. (It is to be noted that the voluntary character of the union-member relationship under the NLRA is due not to any constitutional imperative, as appellants imply (Br. for Appellants, 44-45), but rather the express terms of the second proviso to § 8(a)(3) of the NLRA.) As was said in one of those cases, *Labor Board* v. *General Motors Corp.*, 373 U.S. 734, 742:

> "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core."

As so construed, the NLRA has been determined to be constitutional by every Court which has considered the question, even over the objection of those who claim, not some abstract right of non-association, but a direct interference with their religious scruples. (*Linscott* v. *Miller Falls Company,* 440 F.2d 14 (C.A.1), cert.

Even more strikingly, while appellants rely on the authority of those cases which establish the proposition—with which we, of course, also agree—that "public employment may not be conditioned on a surrender of constitutional rights" (Br. for Appellants, 23 *et seq.*) they subsequently assert a theory of governmental sovereignty which denies all rights whatsoever to public employees:

> "In contrast to private business, government legitimately forces *everyone* to work for it, through taxation or the draft. To be sure, government does not customarily draft public employees; *but it has the authority to do so should society's needs require it.* This is the essence of its *sovereign* power and authority. But if sovereignty *means* the supreme *and unchallengeable* power of compulsion, in questions of public employment as elsewhere, it would be absurd to suggest that government could permit its employees to come under the control or influence of another authority—at least *while remaining sovereign.*" (Br. for Appellants, 181; emphasis in original.)

This theory of the nature of sovereignty and its implica-

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denied, 404 U.S. 872; *Hammond* v. *United Papermakers and Paperworkers Union, AFL-CIO,* 462 F.2d 174 (C.A.6), cert. denied, 409 U.S. 1028; *Yott* v. *North American Rockwell Corp.,* 501 F.2d 398 (C.A.9). See also *Buckley* v. *American Federation of Television and Radio Artists,* 496 F.2d 305 (C.A.2), cert. denied, 419 U.S. 1093.)

Nor does the present case require consideration of the question whether there is a constitutionally protected interest in being free from providing financial support to the partisan political activities of a labor organization, and if so, whether a particular interference with that right is justified by a subordinating compelling interest. For, after the decision below, the PERA imposes no such obligation on appellants. (See pp. 7-14, *supra.*) Thus appellants are not

tions was shared by Mr. Justice Holmes,[40] and appears to underlie—though it was not expressed in—his opinion in *McAuliffe* v. *Mayor of New Bedford,* 155 Mass. 216, 29 N.E. 517. Acceptance of that theory would, of course, entail dismissal of appellants' constitutional claim, for it grants the defendant Board of Education an absolute right to discharge them.

B

Appellants place heavy reliance on *Speiser* v. *Randall,* 357 U.S. 513. Insofar as *Speiser* is cited for the general proposition (which we and appellees accept) that the "right-privilege" dichotomy has been discredited, such reliance is justified. But insofar as *Speiser* is cited as authority for the narrower and controverted proposition that the service fee payments required under the PERA as construed by the Michigan Court is an unconstitutional tax on plaintiffs' asserted freedom not to associate, appellants' reliance on that decision is wholly misplaced.

The statute under attack in *Speiser* provided an exemption for all veterans, subject to the condition that the applicant for an exemption must take an oath that he does "not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostili-

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addressing the statute as it is before the Court when they proclaim: "To the extent that they are required to finance the Union's political and ideological activism as a condtion of continued public employment, the Teachers no longer direct their own social political destinies." (Br. for Appellants, 96.)

[40] See *Kewananakoa* v. *Polyblank,* 205 U.S. 349, 353, citing, *inter alia,* Hobbes, *Leviathan.*

ties'' (*id.* at 515). It thereby created two classes of veterans—those who did not so advocate, and were willing to take the oath, and those who did so advocate or refused to take the oath for some other reason. The former class received the exemption, the latter class was ineligible. Thus, the loss of the exemption penalized advocacy and/or refusal to take the oath. And, as the Court said in *Speiser:* ''It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech'' (*id.* at 518). Here, however, there is no discrimination. The Michigan PERA creates only one class—teachers, all of whom are required to pay the service fee to the chosen representative. Teachers who do not wish to associate with the teachers' union, or who are opposed either to being represented or to any of the other activities of the teachers' union, are required to pay no more than the other teachers; indeed, under the decision below they have a right to pay less. Thus, there is no penalty at all based on the appellants' avowed desire not to associate with the union. Whether the payment is itself a form of association which cannot be compelled is a distinct question, but it is not one which the *Speiser* case addresses. The cases which decide that question are *Hanson* and *Lathrop.* (See pp. 19-31, *supra.*)

C

Appellants assert that the PERA is an unconstitutional ''delegation of power to private parties to structure the public interest according to their own.'' (Br. for Appellants, 126, citing *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, and *Carter* v. *Carter Coal Co.,* 298 U.S. 238.) They state (Br. for Appellants, 60): ''The still

powerful, viable, and sternly constitutional decision of this Court in *Carter* v. *Carter Coal Co.,* 298 U.S. 238 (1936), is especially relevant here for its uncompromising insistence that government may not delegate to majorities of private groups, power over minorities which the government itself could not exercise.''

We need not pause to consider how ''powerful'' and ''viable'' *Carter* remains in light of subsequent authority, *e.g., Currin* v. *Wallace,* 306 U.S. 1; for whatever may be the current status of the anti-delegation doctrine with respect to the federal government, state legislation is not subject to that doctrine, because the federal Constitution imposes no separation of powers requirement on the states. (*Dreyer* v. *Illinois,* 187 U.S. 71, 83-84,[41] followed in *Uphaus* v. *Wyman,* 360 U.S. 72, 77.)

Appellants' citation, in support of this delegation theory, of the separate opinions of Justices Harlan and Douglas in

[41] ''A local statute investing a collection of persons not of the judicial department, with powers that are judicial and authorizing them to exercise the pardoning power which alone belongs to the governor of the state, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the 14th Amendment would not be infringed by a local statute of that character. Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty.''

Lathrop (Br. for Appellants, 126), is a further manifestation of appellants' total misunderstanding of that case. Mr. Justice Harlan not only rejected the view that self-regulation by lawyers under the integrated bar is *Schechter*-type delegation, but directly questioned the applicability of that doctrine to the states. (See 367 U.S., at 854-855.) And Mr. Justice Douglas, whose dissent in *Lathrop* is relied upon by appellants, understood that delegation of authority to a private group by a state raises no *federal* constitutional question. In the footnote to his dissenting opinion which appellants cite Justice Douglas said:

> "A self-policing provision whereby lawyers were given the power to investigate and disbar their Associates would raise under most, if not all, *state* constitutions the type of problem presented in *Schechter Corp.* v. *United States*, 295 U.S. 495. See 1 Davis, Administrative Law Treatise, § 2.14." (*Id.*, at 878, n. 1, emphasis supplied.)

Further, while strong on rhetoric, appellants are quite vague in describing just what decisions Michigan *has* delegated to the unions. Surely, unions have not been delegated the fixing of terms and conditions of employment—these must be agreed upon by the public employer, here, appellee Detroit Board of Education. And they have not been delegated the power to determine whether a service fee must be paid by all employees in the bargaining unit as a condition of employment, or in what amount; these matters too must be agreed to by the public employer. Nor does the state delegate to the union the decision whether the employees shall bargain collectively, and if so, who their representative shall be; that is a decision left to the employees themselves.

D

One decision cited by appellants which is in point, and in their favor, is *Coppage* v. *Kansas*, 236 U.S. 1, 16-17 (Br. for Appellants, 112, 186). *Coppage* expresses the same view of the public good, and particularly of the inutility of labor unions and the transcendent value of individual contract, which underlies appellants' policy arguments here.[42] And *Coppage* is one of the most important manifestations of the conception of the Fourteenth Amendment and the role of the Court in its enforcement which appellants necessarily embrace in urging this Court to substitute their policy judgment for that of the legislature of the State of Michigan. As to the first of these propositions, we do not feel called upon at this stage of history to present an apologia for the existence of the unions in general or public employee unions in particular; the view stated in *Coppage*

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[42] It is well to have before us the exact language to which appellants refer with approval:

> "Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the act to the public health, safety, morals, or general welfare? None is suggested, and we are unable to conceive of any. The act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented." (236 U.S., at 16-17.)

was repudiated in this Court within less than a decade. (See *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209.) More importantly, "[t]his Court beginning at least as early as 1934 * * * has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases." (*Lincoln Federated Labor Union* v. *Northwestern Iron and Metal Company, et al.*, 335 U.S. 525, sustaining state laws which outlawed the union shop.) As was there made plain, the modern interpretation of the due process clauses of the Fifth and Fourteenth Amendments is applicable regardless of whether organized workers or their adversaries invoke the prior, discredited doctrine. See *id.*, at 537.

CONCLUSION

For the foregoing reasons and those stated in the Brief for Appellees, the judgment of the Court of Appeals of Michigan should be affirmed:

Respectfully submitted,

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